

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In re Application of	)	
	)	
EDUCATIONAL INFORMATION	)	File No. BPED-930125IH
CORPORATION	)	
	)	
For Modification of Noncommercial	)	
Educational Station WCPE(FM)	)	
Raleigh, North Carolina	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: June 18, 1998**

**Released: October 8, 1998**

**By the Commission:**

1. The Commission has before it a June 19, 1997 petition for reconsideration ("Petition") filed by Educational Information Corporation ("EIC"), the licensee of noncommercial educational ("NCE") station WCPE(FM), Raleigh, North Carolina. EIC seeks reconsideration of the Commission's action denying EIC's application for review of an August 5, 1995 letter decision ("Letter Decision") from the Chief, Audio Services Division. *Educational Information Corporation, Memorandum Opinion and Order*, 12 FCC Rcd 6917 (1997) ("*Memorandum Opinion and Order*"). The *Memorandum Opinion and Order* upheld the Letter Decision denying EIC's request for a waiver of 47 C.F.R. § 73.509 to permit the 80 dBu interfering contour of WCPE to overlap the 60 dBu protected service contour of second adjacent channel NCE station WXYC(FM), Chapel Hill, North Carolina.<sup>1</sup> The Petition is unopposed. For the reasons set forth below, the Petition is dismissed.

2. On May 27, 1998, subsequent to filing its Petition, EIC filed an application for license to cover the permit authorizing the directional antenna. (File No. BLED-980527KB). However, Section 1.110 of

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<sup>1</sup> EIC's application, as initially filed, sought to increase its antenna height above average terrain from 207 meters to 362 meters at its licensed site. The application specified a directional antenna to prevent prohibited contour overlap of WCPE's interfering contour and WXYC's protected service contour. EIC also requested a waiver of Section 73.509 of the Commission's rules to permit WCPE to receive additional contour overlap from WCCE(FM), Buies Creek, North Carolina with WCPE's protected service contour. In a letter decision dated May 26, 1993, the Audio Services Division granted the 47 C.F.R. § 73.509 waiver with respect to overlap received from WCCE and withheld further action on the WCPE application to permit the submission of additional necessary amendments. EIC subsequently submitted an October 20, 1994 amendment proposing to operate non-directionally and requesting the waiver at issue here. By letter dated May 10, 1995, the staff denied the waiver request, but granted the initially-filed application that specifies a directional antenna. The 100,000 watt Class C facilities authorized in the Letter Decision would give WCPE a total coverage area of over 18,000 square kilometers and permit the station to serve more than ninety-nine percent of the area that would be reached with the proposed non-directional facilities.

the Commission's rules provides that an applicant that objects to a construction permit containing conditions other than those requested must, within 30 days of the grant, file a written request rejecting the grant as made. 47 C.F.R. § 1.110. Section 1.110 bars an applicant from accepting a conditional grant and constructing its facilities in accordance therewith, while simultaneously seeking deletion of the conditions objected to. *See Murray Hill Broadcasting Co.*, 8 FCC Rcd 325, 327 (1993). Accordingly, the EIC Petition is dismissed for failure to comply with Section 1.110.

3. In any event, EIC has not shown that reconsideration of the *Memorandum Opinion and Order* is warranted. Section 1.106(b)(2) of the Commission's rules provides that the Commission will entertain a petition for reconsideration of an order denying an application for review only if the petition relies on new facts. 47 C.F.R. § 1.106(b)(2). Such facts must either relate to events that have occurred or circumstances that have changed since the last opportunity to present such facts or have been unknown until after petitioner's last opportunity to present such matters and could not, through the exercise of ordinary diligence, have been learned prior to such opportunity. 47 C.F.R. § 1.106(b)(2)(i) and (ii). A petition for reconsideration that fails to rely on such new facts or changed circumstances may be dismissed by the staff as repetitious. 47 C.F.R. § 1.106(b)(3). EIC submits additional documentation to support reconsideration on the grounds that the Commission committed material error by allegedly: (1) ignoring the substance of the waiver request and focusing on an "irrelevant" distinction between overlap "caused" and overlap "received"; (2) determining that the additional service proposed by WCPE would be "insignificant" despite overwhelming evidence to the contrary; and (3) determining that a grant of the waiver would be an inefficient use of spectrum. Although EIC submits voluminous amounts of "new" information, it fails to make any showing that it could not have presented such information earlier. Rather, we conclude that EIC improperly attempts to use these "new" facts to reargue certain contentions previously rejected by the Commission in the *Memorandum Opinion and Order*.

4. First, EIC takes issue with the Commission's denial of its waiver request despite WXYC's consent to, and alleged community support for, WCPE's proposed facilities. In this regard, EIC submits a letter in support of its waiver request from Student Educational Broadcasting, Inc., the licensee of WXYC, as well as letters evidencing support from WCPE listeners. The Commission was aware previously of WXYC's consent to the prohibited overlap within WXYC's protected service area and of WCPE listener support for this proposal. *Memorandum Opinion and Order*, 12 FCC Rcd at 6920-6921. To the extent that this new material was not explicitly considered by the Commission, EIC fails to demonstrate that such evidence could not have been included in its application for review through the exercise of ordinary diligence. In any event, the submission of additional documents that purport to support claims that are not in dispute does not justify reconsideration of the *Memorandum Opinion and Order*.

5. Second, EIC disputes the Commission's conclusion that the expansion in WCPE's service area to include 10,000 additional listeners is insufficient to counterbalance diminished service by WXYC within its protected service contour. In this regard, EIC submits an engineering study demonstrating that 3,882 people in WXYC's service area would receive a degraded signal, which EIC claims is insignificant when compared with the 10,000 listeners who would benefit from grant of the waiver. We find that this is also a fact that could have been presented to the Commission as part of the EIC application for review, and therefore, does not fall within the narrow range of facts that may be properly raised on reconsideration of a Commission action. Although EIC did not previously report the number of listeners who would receive a degraded signal in WXYC's service area, the Commission considered the increase in WCPE listenership that would result from grant of the requested waiver and concluded that "this minimal WCPE(FM) service expansion is wholly insufficient to counterbalance diminished service by a second

station within the second station's protected service contour." *Memorandum Opinion and Order*, 12 FCC Rcd at 6919.

6. EIC's supplementary engineering study quantifying the potential impact on WXYC listeners does not alter that conclusion nor put in issue the Commission's prior evaluation of EIC's waiver request. The granted modification application would permit WCPE to reach an additional 270,000 listeners. *Id.* Absent any showing by EIC that the 10,000 listeners that would receive new service from WCPE are underserved, our prior conclusion that the amendment proposes a minimal service increase is fully justified. Moreover, any loss of service is *prima facie* inconsistent with the public interest and can only be justified by offsetting public interest benefits. *See, e.g., Hall v. FCC*, 237 F.2d 567, 572 (D.C. Cir. 1956). A gain in service in one area will not necessarily offset a loss elsewhere. *Television Corp. of Michigan, Inc.*, 294 F.2d 730 (D.C. Cir. 1961). This is not a case where the service gains are so substantial as to tip the public interest balance in EIC's favor. *See Heartland Radio, Inc.*, 11 FCC Rcd 1698 (1996) (granting modification application where gain area is fourteen times larger than loss area and proposal complies with technical rules). Denying EIC's Section 73.509 waiver request is particularly warranted where the service loss involves an existing station. *See John McCutcheon d/b/a MCC Communications*, 4 FCC Rcd 2079, 2082 (1989).

7. Third, in support of its claim that the proposed facilities represent an efficient use of the spectrum, EIC reiterates its argument that the Commission should have considered its proposal under the commercial FM rules. In this regard, EIC submits for the first time an engineering study to demonstrate that, contrary to the Commission's conclusion in the *Memorandum Opinion and Order*, EIC's proposal complies with the Commission's commercial rules. For the same reasons as above, EIC's attempt to introduce this information is barred by 47 C.F.R. § 1.106(b)(2). We also note that EIC's interpretation of the FM commercial rules is erroneous and that its non-directional amendment would be subject to dismissal thereunder based on a proposed egregious short spacing of over 40 kilometers.<sup>2</sup>

8. In sum, we find that EIC does not rely on the limited range of new facts or changed circumstances that a petitioner for reconsideration must present in seeking reconsideration of a Commission action. Moreover, EIC's supplementary showings fail to establish that reconsideration is warranted.<sup>3</sup>

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<sup>2</sup> If, *arguendo*, the amendment were processed under the Commission's commercial rules, WCPE would be required to specify a transmitter site that is separated from the WXYC site by at least 93 kilometers. *See* 47 C.F.R. § 73.215(e). The WCPE and WXYC facilities are 51.4 kilometers apart, a short-spacing of 41.6 kilometers. *See Memorandum Opinion and Order*, 12 FCC Rcd at 6922 n.7 and 6923. EIC's claim that based on the actual facilities of WCPE and WXYC, the stations need only be 23.4 kilometers from each other reveals a fundamental misunderstanding of this Commission rule. Section 73.215 requires applicants to comply with both distance separation *and* contour protection standards. 47 C.F.R. § 73.215(a) (contour protection) and (e) (minimum distance separation). The fixed minimum spacing requirements are based on station class and frequency relationships, and protect operating stations to class maximums. Separation minima would not be calculated on the basis of WXYC's actual facilities, as EIC's engineering study suggests. In short, the WCPE proposal would be subject to dismissal as patently defective pursuant to 47 C.F.R. § 73.3566 under the commercial FM technical rules.

<sup>3</sup> The remaining arguments raised by EIC in its petition were fully considered in the *Memorandum Opinion and Order* and we decline to address them here. It is well settled that reconsideration will not be granted merely to rehash matters already treated and resolved. *See e.g. WWIZ, Inc.*, 37 FCC 685 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).

9. ACCORDINGLY, IT IS ORDERED, That pursuant to 47 C.F.R. §§ 1.106(b)(3) and 1.110, the Petition for Reconsideration filed by Educational Information Corporation on June 19, 1997 IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary